SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF TOLLAND
AT G.A. 19 (ROCKVILLE)

S.C. 20252

JOSEPH MOORE

v.

COMMISSIONER OF CORRECTION

APPENDIX

APPENDIX
TABLE OF CONTENTS

STATUTORY PROVISIONS

General Statutes § 53-202k. Commission of a class A, B or C felony with a firearm: Five-year nonsuspendable sentence

Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3, except an assault weapon, as defined in section 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony.

General Statutes § 53a-133. Robbery defined

A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

General Statutes § 53a-134. Robbery in the first degree: Class B felony

(a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

(b) Robbery in the first degree is a class B felony provided any person found guilty under subdivision (2) of subsection (a) shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.

General Statutes § 53a-136. Robbery in the third degree: Class D felony

(a) A person is guilty of robbery in the third degree when he commits robbery as defined in section 53a-133.

(b) Robbery in the third degree is a class D felony.

General Statutes § 53a-35a(8) (Rev. to 2011). Imprisonment for felony committed on or after July 1, 1981. Definite sentence. Authorized term

For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines the crime specifically provides otherwise, the term shall be fixed by the court as follows: (1) For a capital felony, a term of life imprisonment without the possibility of release unless a sentence of death is imposed in accordance with section 53a-46a; (2) for the class A felony of murder, a term not less than twenty-five years nor more than life; (3) for the class A felony of aggravated sexual assault of a minor under section 53a-70c, a term not less than twenty-five years or more than fifty years; (4) for a class A felony other than an offense specified in subdivision (2) or (3) of this section, a term not less than ten years nor more than twenty-five years; (5) for the class B felony of manslaughter in the first degree with a firearm under section 53a-55a, a term not less than five years nor more than forty years; (6) for a class B felony other than manslaughter in the first degree with a firearm under section 53a-55a, a term not less than one year nor more than twenty years; (7) for a class C felony, a term not less than one year nor more than ten years; (8) for a class D felony, a term not less than one year nor more than five years; and (9) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime.

General Statutes § 53a-40 (Rev. to 2011). Persistent offenders: definitions; defense; authorized sentences; procedure

* * * * *

(c) A persistent serious felony offender is a person who (1) stands convicted of a felony, and (2) has been, prior to the commission of the present felony, convicted of and imprisoned under an imposed term of more than one year or of death, in this state or in any other state or in a federal correctional institution, for a crime. This subsection shall not apply where the present conviction is for a crime enumerated in subdivision (1) of subsection (a) of this section and the prior conviction was for a crime other than those enumerated in subsection (a) of this section.

* * * * *

(j) When any person has been found to be a persistent serious felony offender, the court in lieu of imposing the sentence of imprisonment authorized by section 53a-35 for the crime of which such person presently stands convicted, or authorized by section 53a-35a if the crime of which such person presently stands convicted was committed on or after July 1, 1981, may impose the sentence of imprisonment authorized by said section for the next more serious degree of felony.

* * * * *

General Statutes § 53a-40. Persistent offenders: Definitions; defense; authorized sentences; procedure

* * * * *

(f) A persistent offender for possession of a controlled substance is a person who (1) stands convicted of possession of a controlled substance in violation of the provisions of section 21a-279, and (2) has been, at separate times prior to the commission of the present possession of a controlled substance, twice convicted of the crime of possession of a controlled substance.

* * * * *

(m) When any person has been found to be a persistent larceny offender, the court, in lieu of imposing the sentence authorized by section 53a-36 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment for a class D felony authorized by section 53a-35, if the crime of which such person presently stands convicted was committed prior to July 1, 1981, or authorized by section 53a-35a, if the crime of which such person presently stands convicted was committed on or after July 1, 1981.

* * * * *

General Statutes § 53a-40b. Additional term of imprisonment authorized for offense committed while on release

A person convicted of an offense committed while released pursuant to sections 54-63a to 54-63g, inclusive, or sections 54-64a to 54-64c, inclusive, other than a violation of section 53a-222 or 53a-222a, may be sentenced, in addition to the sentence prescribed for the offense to (1) a term of imprisonment of not more than ten years if the offense is a felony, or (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.

CONSTITUTIONAL PROVISIONS

Article First, § 8 of the Connecticut Constitution. Rights of accused in criminal prosecutions. What cases bailable. Speedy trial. Due process. Excessive bail or fines. Probable cause shown at hearing, when necessary. Rights of victims of crime

Sec. 8. [As amended] a. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property

without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.

b. In all criminal prosecutions, a victim, as the General Assembly may define by law, shall have the following rights: (1) the right to be treated with fairness and respect throughout the criminal justice process; (2) the right to timely disposition of the case following arrest of the accused, provided no right of the accused is abridged; (3) the right to be reasonably protected from the accused throughout the criminal justice process; (4) the right to notification of court proceedings; (5) the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony; (6) the right to communicate with the prosecution; (7) the right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused; (8) the right to make a statement to the court at sentencing; (9) the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law; and (10) the right to information about the arrest, conviction, sentence, imprisonment and release of the accused. The General Assembly shall provide by law for the enforcement of this subsection. Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.

Article First, § 9, of the Connecticut Constitution. Right of personal liberty.

No person shall be arrested, detained or punished, except in cases clearly warranted by law.

Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the United States Constitution provides: (pertinent part)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

8-21-2009

- 45 yrs old
  been locked up all but 12 yrs since Δ was 18
- Δ would like to come back in October

9/25

9/24/09

FTA warrant at time

45 y.o. lifelong criminal

prior sale/sex convictions

w/ numerous misdemeanors

2x on probation at time of crime

10 to serve plus 5 sp

12-3-09 VOP's in Danielson

owes 3 yrs there

9.25.09

T. Sul, CL. J.T.S, SA. G, PD. O, R. June, JM in our Lockup + Brought Into Ct.

- Lifelong communal says Matt

On probation; owes | 3 yrs in Windham there was out on FTA

- Rec'd UA on GA12 Poss case pending at time of crime
- Windham MV Prawn 13 still open G1C of Windham VOP 10.1.09 } ponytail glasses
- 11.18 Hartford VOP } balding (receding) black guy
- Double Digits followed by Special Parole
- My numbers are possible
- He's better off pleaing here (SA 2 7/24/09
- CoΔ witness wants her car back

Kevin Connors is her atty.

- Δ says that he was high off of cocaine at the time of the crime. That he had been released from St. Francis just prior to the incident.
- Δ says that he was refered to Wheeler Clinic for dual diagnosis treatment after his inpatient treatment
- Δ says that he ~~was~~ is very sickly. That he's going through a divorce. Δ says that he wants a long continuance
- Δ says that he's still hearing voices
- Δ says that he just used a note, not a gun.
- Δ has had 3 heart attacks, and then a triple bypass
- Δ has cardiac rehab is awaiting sentencing

11-13-09

CT-Sully, CL-DHJ, SA-G, PD-O, R-Jurd, JW in our LH + Brought Into Ct.

- Δ says he's having chest pains while in prison. Hasn't seen heart doctor Gomez on asylum St (St Francis) since he's been in jail. (Previously was seeing him weekly).
- Δ's trying to avoid meds to keep a clear head to understand Ct. Says that avoiding the meds results in him hearing voices through.
- Δ is at Gamer, says the ride is killing him.

- Δ says he never admitted to having a gun
- Δ says it's not a Larceny 1st if he only got $3500 → charge is LB
- Δ says he didn't hurt anybody
- Δ says he successfully did 2½ yrs on probation
- Δ says he was under the influence
- Δ says he was under the influence wants to go to Whiting
- Δ says that w/ medication he'd end up making the wrong decision which is why he avoids it.

Δ willing to take
- 10 after 4 w/ probation + special parole to follow
- 10 probation
- 10 special parole

(24 yrs says Δ)

2·26·2010

T. Sull, CL·D+S, SA·G, PA·O, R·El, JM, hour LU

- Δ says that after Nov. 2009, if Δ is under the influence, Δ's statement is no longer admissable.
- Δ was shown info. Matt provided regarding the note + property list.
Δ was also told about previous Robbery sentences not going well.
Δ says that he has considered all info provided up front but that he wishes to take chances with JPT.
- Δ says no gun, only a note, notes are only worth 4 yrs not 10.
Δ says he was under the influence didn't hurt anybody, and got only 3500. Δ says that he has no bank robbery history. Serial female robber w/ drug problem got 4 yrs so should he.
- Δ says he had triple bypass, 1 wk out of the hospital Δ relapsed on alcohol + cocaine + weed. Δ wants to go to 18 mo. program at LP.
- Δ went to St Francis after that relapse + Δ was diagnosed Bipolar and Schizoaffective and Major Depression, Δ begged not to be discharged, but doc said Δ should go outpt. to Wheeler Clinic in NB. Δ went there w/ wife + tried to get services + meds, that never happened 6/c 30K dr. bill, Δ lost job, + Δ's new offense occurred.
- Δ has been to Capitol Region + successfully completed their programming.
- Δ has had 2 1/2 heart attacks already and bypass. I am not going to be around much longer.
- Wife has taken off on Δ. She cashes his checks and if it weren't for Δ's Mom, Δ would have nothing.
Δ only did a note, didn't try to scare teller.
- Life is rough in DOC + hopeless - his remaining life is too short.
- If no program, then give me a shot at a prgm.
- Danielson + Hartford VOP's in program risk of retention to Δ, delivered no threat + Δ elected to proceed

3-19-2010

TC from Couns. which I took who gave me a chance to spk w/ JM.

JM very upset but more whiny than rude. Kept expressing frustration over his willingness to plead and relatively harmless actions at crime scene yielding such a lousy offer from Matt.

We discussed note and Δ's medical condition as add'l points (says video will show note was fabricated + that actual note went into the river w/ him + didn't mention gun).

Explained current offer is Matt's + that JPT w/ Sullivan awaits but that even if were successful in getting the ~~#~~ down ~~##~~ Pens.-off. tool ~~of the state~~ is prosecutor's way of trying to restrain generosity from Judge.

3·26·2010

T: Sul, CL: C+D, SA: G, PD: O, R: June

→ PFO 10-25 on the B Fel
facing

→ Crimes while on Release > Adds 10

25 > Matt will ask for

PSI

26 Priors beginning in 1980

- Δ says that he has lost everything and could die. He wants to take his chances with the Judge. Even though I said that Judge thought more like Matt than not, and for only 3500.
- Δ says he didn't go in with a gun. No mask + wasn't impolite and "I didn't hurt anybody."
- He started off by saying he wanted a program from day one (after current 8 mos. in Jail), but then
- 4 or 5 as a fall back
- Δ wants handwriting analysis done and his dna from the note and film show Δ with the note

7-9-2010

CT-Sully, CL-Δ+S Elena, SA-G, PΔ-O, R-L, JM in our LL + BIC

- Δ wants a Mental Health Evaluation, doesn't have to be Whiting (once I explain drawbacks of that)
- Δ says that Δ's wife has additional information about Δ's mental health that Elena hasn't already gathered
- Δ says that since Pretrial didn't result in deal he wants trial now and that DNA testing of the note will show it's not his Δ DNA on the note

— Gaynette Floyd + her Mom Margorie Floyd
379 Lasalle St
New Britain CT 0605
Doesn't know phone #

works at Middlesex Hosp.

— 8-13 Final

8-13-2010

~~T.~~ Sull, CL-CTS, SA-G, PD-O, R-DW, JM in ourtt + BIC, Elena not in on Fridays

- Fingerprint
- DNA
- ~~Fccc~~
- Handwriting Analysis – says he didn't write note, note went ~~came~~ in the River

High utilisers

High on drugs
" " Rx
" " alcohol
" having Mental Health Problems

- He feels case is worth only 5 yrs.
- Feels it is an R3 not an R1
- Lady didn't suffer nightmares or anything
  Had just been at Blue Hills + was discharged
  outreach program Willard MNewBritain

(2) Δ refused offer saying it's an R3 not R1 but later
Matt reminds – Δ claims note went on water
but ~~*~~ video stills show Δ~~*~~
writing note at counter, prior to ~~not~~
just
going to Teller window.

(1) offer refused after my requests for Continuance to late Sept. or FJ marking w/o offer being withdrawn were denied by Matt + Sully.

12-1-2010

CT: Sully, CC-C, SA-G, PD-O, R-Jeannie, JM & our LA
Brought into Ct.

- Δ has heard that driver has left town though he still wants to proceed to accept responsibility for them both
- Δ says that dudes who run law libraries say that with a paid lawyer Δ can get the note supposedly said suppressed because Teller gave what note back to Δ instead of returning it like she should have according to "policy" Δ is not denying the robbery, just the robbery 1
- 2 bank robberies (mistook John Drew) - - - -
- Δ says that when Teller gave note back, she made a mistake
- Δ says customer witness should know what the note says b/c Δ believes customer witness could read Δ's note and that the note didn't contain any "gun" reference
- Δ wants to go to trial only to reduce the charge
- Δ says that hospital reports will show that toxicology reports will provide a defense to Δ's acts at the time of the offense
- Matt's offer penned 9-24

10 + 5 sp
to
serve

10 + 2

- After lengthy discussion w/ Matt, I explnd that offer was reduced to 10+2 today w/ a o v r ncd. I showed Δ paperwork from Matt confirming letter + Δ said where did it come from? if Feder, ofnd it to the Δ? (Recved from Δ b/c Police - if so there must be a opt. Matt will provide more

1·22·2010

Δ wants to know how after 6 months, the note can come in and be used against him.

(1) note just appeared on last court date
(2) note is not Δ's handwriting
(3) Δ's ~~doesn't~~ doesn't know who's handwriting it is
(4) Δ never said he had a gun
(5) ~~Δ~~ Δ says that teller's stmt is different from what the note says give dash I have gun vs. give me the cash I have a gun
(6) Δ says that video doesn't show anything in Δ's hand gun or note.
(7) Δ says after taking the note back, he threw note in the same River in which he lost his sneaker
(8) Δ says that customer looking over Δ's shoulder had to have read Δ's note b/c this is the W who eventually called the police after standing right next to Δ while Δ's note was in W's line of sight
(9) Δ wants to know where cellphone is now?
(10) Δ went down to the River to avoid capture
Δ ~~knew~~ knew how to avoid the dogs + cops ~~by~~ by cooling self off in water + leaning against Rock in River.
(11) where has this supposed note been all this time.

1-21. Accept or Reject

2015 WL 2193713
Only the Westlaw citation
is currently available.
United States District Court,
D. Arizona.

Ernest CHRZASZCZ,
Movant/Defendant,
v.
UNITED STATES of America,
Respondent/Plaintiff.

Nos. CV 14–67–PHX–JAT, CR 09–1381–PHX–JAT. | Filed May 11, 2015.

Attorneys and Law Firms

Ernest Chrzaszcz, Big Spring, TX, pro se.

Donald J. Pashayan, US Attorneys Office, Phoenix, AZ, for Respondent/Plaintiff.

ORDER

JAMES A. TEILBORG, Senior District Judge.

*1 Pending before the Court is Movant's motion to vacate, set aside, or correct sentence. Doc. 1.[1] On December 17, 2014, the Magistrate Judge to whom this case was assigned issued a Report and Recommendation (R & R) recommending that the Motion be denied. Doc. 13. Movant has filed a "motion to reconsider" which the Court will treat as objections to the R & R. Doc. 15.

1 All Doc. numbers refer to CV 14–67–PHX–JAT unless otherwise noted.

In his Motion and in his Objections, Movant makes one primary argument with several underlying factual bases. Specifically, Movant's primary argument is that he received ineffective assistance of counsel because his counsel did not give him enough information to realize he should have taken the plea agreement rather than go to trial. Objections at 7. Additionally, Movant argues that his sentence is disproportionate to that of his co-defendants. *Id.*

Review of R & R

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."28 U.S.C. § 636(b)(1). It is "clear that the district judge must review the magistrate judge's findings and recommendations *de novo if objection is made,* but not otherwise."*United States v. Reyna–Tapia,* 328 F.3d 1114, 1121 (9 th Cir.2003) (*en banc*) (emphasis in original); *Schmidt v. Johnstone,* 263 F.Supp.2d 1219, 1226 (D.Ariz.2003) ("Following *Reyna–Tapia,* this Court concludes that *de novo* review of factual and legal issues is required if objections are made, 'but not otherwise.' "); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgml.,* 589 F.3d 1027, 1032 (9th Cir.2009) (the district court "must review de novo the portions of the [Magistrate Judge's] recommendations to which the parties object."). District courts are not required to conduct "any review at all ...*of any issue* that is not the subject of an objection."*Thomas v. Arn,* 474 U.S. 140, 149, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) (emphasis added); *see also*28 U.S.C. § 636(b)(1) ("the court shall

make a *de novo* determination of those portions of the [report and recommendation] to which objection is made.").

Accordingly, as indicated above, the Court will treat Movant's "motion to reconsider" as objections to the R & R and will review the portions of the R & R that Movant sought to "reconsider" de novo.

Appointment of Counsel

In his objections, Movant did not object to the R & R's conclusion that no evidentiary hearing is necessary to decide this case. This Court accepts that recommendation. *See* R & R at 10–11.

In his objections, Movant sought appointment of counsel. Doc. 15 at 11. This Court has discretion to appoint counsel if the Court "determines that the interests of justice so require."*Terrovona v. Kincheloe,* 912 F.2d 1176, 1181 (9th Cir.1990), *cert. denied,*499 U.S. 979, 111 S.Ct. 1631, 113 L.Ed.2d 726 (1991) (quoting 18 U.S.C. § 3006A(a) (2) (B))."In deciding whether to appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved."*Weygandt v. Look,* 718 F.2d 952, 954 (9th Cir.1983).

2 In this case, the Court finds that Movant has competently articulated his claims pro se and, given the record, is unlikely to succeed on the merits. Accordingly, the Court denies the request to appoint counsel.

Merits of Ineffective Assistance of Counsel Claim

The R & R recounts the legal standard for an ineffective assistance of counsel claim and Movant did not object to that statement of the law. Accordingly, the Court accepts it. Specifically, the R & R stated:

> Generally, claims of ineffective assistance of counsel are analyzed pursuant to *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on such a claim, Movant must show: (1) deficient performance-counsel's representation fell below the objective standard for reasonableness; and (2) prejudice-there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 687–88. Although the petitioner must prove both elements, a court may reject his claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial.*Id.* at 697.
>
> The court hearing an ineffective assistance of counsel claim must consider the totality of the evidence with an eye toward the ultimate issue of whether counsel's conduct so undermined the functioning of the adversarial process that the proceeding lacked fundamental fairness. *Id.* at 686; *Card v. Dugger,* 911 F.2d 1494 (11th Cir.1990) (observing that counsel cannot be labeled ineffective for failing to raise issues which have no merit); *Boag v. Raines,* 769 F.2d 1341, 1344 (9th Cir.1985) (failing to raise meritless argument on appeal does not constitute ineffective assistance of counsel).

> In the unique context of a claim of ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, to establish the requisite prejudice "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel."*Missouri v. Frye*, ——U.S. ——, ——, 132 S.Ct. 1399, 1409, 182 L.Ed.2d 379 (2012)."Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law."*Id.*

R & R at 11–12.

In his objections, Movant focuses his claim on ineffective assistance of counsel on his allegation that his counsel never told him he could be facing 20 years after trial. Doc. 15 at 4, 6–8, 10. Conversely, Movant's counsel has avowed that he repeatedly advised Movant of the length of time he was facing and strongly and repeatedly encouraged him to take the plea agreement offered by the Government. R & R at 14–15 (summarizing counsel's affidavit). Counsel further avows that Movant had no interest in taking any plea other than one for time served. *Id.* Consistent with counsel's statements in his affidavit, at the end of his Objections to the R & R, Movant requests to be re-sentenced to "time served"—not to the amount of time offered under the plea agreement he rejected. Doc. 15 at 11.

***3** Additionally, in his Objections, Movant argues that the plea he was offered was disparate from the sentences his co-Defendants received. Doc. 15 at 5. Also, in his Objections, Movant reiterates that he asked his, "Attorney and the AUSA to be sentenced to time served or to 20–30 months...." Doc. 15 at 5. Movant also states that the plea he was actually offered of 60 to 70 months was disproportional to his co-defendants. *Id.*

On this record, given Movant's repeated statements in his Objections that he would only have accepted a plea to time served or to something far less than he was ever offered, the Court cannot find that (as is required to prevail on a claim of ineffective assistance of counsel under *Frye*, 132 S.Ct. at 1409) Movant would have accepted the plea that was actually offered in this case if counsel had been "effective." In so finding, and based on counsel's affidavit, the Court does not find counsel was actually ineffective. However, even assuming he was, both counsel's affidavit and Movant's request for relief in his Motion and Objections all make clear Movant sought and still seeks a plea to time served. It is undisputed on this record that no such plea was ever offered by the Government. Accordingly, the Court finds Movant has not shown ineffective assistance of counsel under the unique circumstances outlined in *Frye*.

Other claims

In his Objections, Movant also raises two sentencing claims: 1) that his sentence was disproportional to what his co-defendant received; and 2) he should have received a downward departure for acceptance of responsibility. Doc. 15 at 5. Following his conviction at trial, Movant appealed to the Ninth Circuit Court of Appeals. Doc. 653 in

CR 09–1381. The Court of Appeals affirmed Movant's conviction and sentence. Doc. 795 in CR 09–1381.

Movant could have raised these two claims with the Court of Appeals during Movant's direct appeal and he did not.[2] Therefore, the claims have been procedurally defaulted. A procedurally defaulted claim typically cannot be raised in a § 2255 petition. *Bousley v. United States,* 523 U.S. 614, 621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). To excuse a procedural default, a movant must demonstrate either cause and prejudice, or actual innocence. *U.S. v. Ratigan,* 351 F.3d 957, 962 (9th Cir.2003).

2 *See* Doc. 1 at 2 (explaining that the only claim raised on appeal was insufficient evidence to convict); *see also* Doc. 795 in CR 09–1381.

Here, the Court finds Movant has not shown cause and prejudice or actual innocence to overcome this default. Accordingly, this Court will not reach the merits of these claims.

Conclusion

Based on the foregoing,

IT IS ORDERED that the Report and Recommendation (Doc. 13) is accepted and adopted, the objections (styled as a motion to reconsider, Doc. 15) are denied and overruled, and the Clerk of the Court shall enter judgment denying the motion to vacate, set aside or correct sentence (Doc. 1) with prejudice.

IT IS FURTHER ORDERED that, in the event Movant files an appeal, a certificate of appealability and leave to appeal in forma pauperis is granted on Movant's claim of ineffective assistance of counsel premised on *Missouri v. Frye,* —U.S. ——, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012).

*4 DATED this 8 th day of May, 2015.

Report & Recommendation on Motion To Vacate, Set Aside or Correct Sentence

JAMES F. METCALF, United States Magistrate Judge.

I. MATTER UNDER CONSIDERATION

Movant, following his conviction in the United States District Court for the District of Arizona, filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 on January 13, 2014 (Doc. 1, 2). On May 12, 2014, Respondent filed its Response (Doc. 9). Movant filed a Reply on July 18, 2014 (Doc. 12).

The Movant's Motion is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 10, Rules Governing Section 2255 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

In their Joint Stipulated Description of the Case filed in the underlying criminal proceeding,

the parties described the factual allegations as follows:

> The government has alleged that Ernest Chrzaszcz and Zenon Chrzaszcz participated in a drug conspiracy involving Ted Morawa, Albert Chrzaszcz, Joe Soltys, Holly Merriman and others. The government alleges that a conspiracy to distribute heroin, cocaine and marijuana ran from November 1, 2006 through April 11, 2010. As part of the conspiracy, it is alleged that Ted Morawa and others would transport illegal drugs from sources of supply in Phoenix and Mexico to other parts of the United States and return with drug proceeds to deliver to the sources of supply. The government further alleges that the defendants possessed with intent to distribute heroin, cocaine and marijuana on or about July 19, 2009.

(CR Doc. 509.) (The docket in the underlying criminal case, CR–09–1381–PHX–JAT, is cited herein as "CR Doc. ____." Exhibits to the Response herein, Doc. 9, are referenced herein as "Exhibit ____.")

B. PROCEEDINGS AT TRIAL

On November 2, 2009, the defendant and three others were indicted for violations of Title 21 U.S.C. §§ 841, 846 and 856 and Title 18 U . S.C. §§ 2 and 1956. (CR Doc. 3.) On May 12, 2010, a superseding indictment was filed (CR Doc. 57) which added twelve more defendants to the case and modified charges in the original indictment. Defendant was charged with four counts: (1) Count One—Conspiracy to Possess with the Intent to Distribute Heroin, Cocaine and Marijuana; (2) Count Three—Possession with Intent to Distribute Heroin; (3) Count Four–Possession with Intent to Distribute Cocaine; and (4) Count Five–Possession with Intent to Distribute Marijuana

Movant was arrested on December 3, 2010. (CR Doc. 220, Arrest Warrant Returned.) He was arraigned, ordered detained, and attorney Loyd Tate was appointed to represent him. (CR Doc. 214, M.E. 12/6/10.)

Over the course of the next eight months, plea negotiations continued unsuccessfully.

*5 ***Proposal for Cooperation Agreement***– In December, 2010, the government contacted Mr. Tate regarding a proposal for cooperation. Tate advised that "he's just not interested in cooperating," but inquired about a plea offer. Movant argued his innocence based upon his lack of knowledge of the controlled substances discovered in his semitruck. (Exhibit A, Voicemail 12/27/10; Exhibit E, Tate Affid. at ¶¶4–6.)

First Plea Offer—On February 16, 2011, the government tendered a plea offer for Movant to plead guilty to Count One, with sentencing provisions for a recommendation for a two-level reduction in the offense level for acceptance of responsibility, plus an additional

one-level reduction if the calculated offense level was 16 or more. (Exhibit B, Email and Plea Agreement.) Defense counsel reviewed the terms of the offer with Movant on February 24, 2011, advised Movant that the prospects of trial were not promising, and reviewed the potential prison term (20 years) at trial. Movant responded that "unless he was given a plea to the time already served he would not accept a plea agreement."(Exhibit E, Tate Affid. at ¶ 8.)

Arrangements were made for a meeting between the prosecutor, investigators and Movant. Movant was transported from the prison and appeared. Movant and counsel met with the investigators and the prosecutor. The prosecutor reviewed the charges, evidence and plea agreement with Movant. The potential at sentencing was reviewed (10 to 20 at trial vs. as low as 5–6 years under the plea). Counsel urged Movant to accept the offer. Movant responded that counsel was threatening him with 20 years in prison to get him to take the plea offer. Counsel asked the agents and prosecutor to leave the room and again urged Movant to accept the plea offer. Movant continued to protest his innocence, and rejected the plea offer. (Exhibit D, Prisoner Schedule Report; Exhibit C, Report of Investigation 3/10/11; Exhibit E, Tate Affid. at ¶ 7–11.)

Counter Offer—Counsel was later advised that Movant's brother would testify against Movant on his knowledge that the drugs were in the truck. On March 10, 2011, counsel conveyed a counter offer to the prosecutor, offering a plea to possession of marijuana, with a 20–30 month stipulated prison sentence. Although amenable to stipulating to a minor role, on April 1, 2011, the prosecutor emailed a rejection, which counsel relayed to Movant. (Exhibit E, Tate Affid. at ¶ 12–13; Exhibit F, Emails 3/31/11–4/1/11.)

Second Plea Offer—On April 5, 2011, the prosecutor made a second plea offer for Movant to plead to Count One, but reducing the types and quantities of drugs, and adding a recommendation for two level downward adjustment for a minor role. Counsel again reviewed the offer with Movant and recommended acceptance. Movant declined and requested that the charge be modified to refer only to marijuana. (Exhibit E, Tate Affid. at ¶ 14–17; Exhibit G, Email 4/5/11 and Plea Agreement; and Exhibit H, Voicemail 4/8/11.)

***6** At the hearing on April 11, 2011, the prosecutor observed: "And we have conveyed plea offers. There's been negotiations on that. I know that both attorneys have represented—presented the plea offers to the defendants."(Exhibit I, R.T. 4/11/11 at 8.)

Movant was advised by the prosecutor and the Court that the plea offer would be expiring. (*Id.* at 9–10.)

Counsel continued to discuss the plea agreement with Movant, on April 11, 2011, July 19, 2011; August 5, 2011, and October 27, 2011. (Exhibit E, Tate Affid. at ¶ 16.)

On May 17, 2011, the prosecution emailed counsel and indicated that the government remained open to the plea. (Exhibit J, Email 5/17/11.) Counsel responded requesting various records, which were reviewed with Movant, who continued to insist on an offer for time served. (*Id.*; Exhibit E, Tate Affid. at ¶ 18.)

On August 4, 2011, the prosecution emailed the Court and defense counsel to advise that the government would be willing to consider reopening its plea offer if both Movant and his father agreed to a plea. (Exhibit G, Email 8/4/11; Exhibit E, Tate Affid. at ¶ 18.).) Movant's father had agreed, but Movant refused. (Exhibit L, R.T. 8/24/11 at 19–20.)

On August 24, 2011, Movant appeared for a Final Pretrial Conference. The Court set a plea cutoff date of November 21, 2011, but the prosecutor clarified that the prior attempts at a plea agreement had failed, and there were then no open plea offers, the most recent having expired in July. (Exhibit L, R.T. 8/24/11.)

On November 16, 2011, Movant appeared for a status conference. The prosecution clarified the plea cut-off date, but observed: "not that there are any pleas out to either of these defendants at this time, but if the defendants were requesting any pleas that would be the time that they would have to be entered by that date."(Exhibit M, R.T. 11/16/11 at 13.) Nonetheless, at sentencing, the prosecution represented that "the Government would have given him the benefit of the plea agreement up until the day of trial."(Exhibit N, R.T. 2/21/12 at 11.)

Trial—On November 29, 2011, Movant proceeded to trial and was eventually convicted on all charges. (CR Doc. 523, M.E. 11/29/11; CR Doc. 536, M.E. 12/8/11; CR Doc. 12/8/11, Verdict.)

Movant was sentenced on February 21, 2012 to concurrent terms of 262 months. (CR Doc. 639, M.E. 2/21/12; CR Doc. 643, Sentence.)

C. PROCEEDINGS ON DIRECT APPEAL

Petitioner filed a direct appeal arguing that there was insufficient evidence to convict him at trial. The Ninth Circuit rejected the contention, summarizing the evidence as follows:

> Chrzaszcz was apprehended as the passenger of a truck carrying large amounts of heroin, cocaine, and marijuana. He asserts that the only evidence that he was aware of the truck's cargo was a coconspirator's "bare assertion that 'he knew.' " We reject Chrzaszcz's characterization of the evidence. Two coconspirators confirmed that Chrzaszcz knew of the drugs in the truck. One of these coconspirators testified that he personally discussed drug trafficking plans with Chrzaszcz. The government also introduced a recorded phone conversation in which Chrzaszcz discussed cocaine prices with a coconspirator and testimony from law enforcement officers who observed Chrzaszcz taking delivery of marijuana several days prior to his arrest, among other evidence.

*7 (CR Doc. 795, Mem. Dec. at 2–3.) His conviction was affirmed. (*Id.* at 3.)

E. PRESENT MOTION TO VACATE

Motion—Movant commenced the current case by filing his Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) and Declaration in Support of § 2255 Motion (Doc. 2), on January 13, 2014. Movant's Motion asserts a single ground for relief, asserting that trial counsel provided ineffective assistance in failing to adequately advise him on the plea offers, but for which he would have taken a favorable plea agreement.

Response—On May 12, 2014, Respondent filed its Response ("Answer") (Doc. 9). Respondent argues that Movant was adequately advised, repeatedly rejected favorable offers in the face of that advice while asserting his innocence, and given his steadfast refusal to accept a plea offer and protestations of innocence there was not a likelihood that different advice would have resulted in him accepting a plea

Reply—On July 18, 2014, Movant filed a Reply (Doc. 12). Movant argues: (1) counsel's affidavit should be stricken for containing material misrepresentations, and because it is not made under penalty of perjury; (2) argues the merits of his claims; and (3) argues that he could have sought an *Alford* plea while maintaining his innocence. Movant provides declarations from himself and others in support.

III. APPLICATION OF LAW TO FACTS

A. CONSIDERATION OF COUNSEL'S AFFIDAVIT

Movant contends that trial counsel's affidavit should be stricken because it was not made under penalty of perjury, and because it contains various purported misrepresentations.

1. Sufficiency of Jurat

Movant argues that because trial counsel's Affidavit (Exhibit E) fails to indicate that it was made under penalty of perjury, it is deficient and should be stricken.

The Affidavit reflects that counsel's affidavit was made "after being duly sworn." (Exhibit E at 1.) The notary public further indicated that the Affidavit was "Sworn to and Subscribed to before me."(*Id.* at 5.)

The jurat is sufficient.

It is true that 28 U.S.C. § 1746, which permits declarations to be used in lieu of sworn affidavits specifies that the declarant's signature must indicate that it is made "under penalty of perjury." No such requirement applies to sworn affidavits. "The jurat should show that the statements made in the affidavit were properly sworn to by the affiant before an authorized officer, but since the *jurat* is evidentiary in character, little formality is ordinarily required of it, and mere clerical errors therein will not affect its validity."2A C.J.S. Affidavits § 29.

Indeed, 18 U.S.C. § 1621 acknowledges that perjury penalties apply to both declaration sunder penalty of perjury and statements under oath.

Movant references a number of cases with notations that they hold that to be considered statements must be sworn (or under oath) or stated to be made under penalty of perjury. *See e.g. Haouari v. United States,* 510 F.3d 350, 354 (2d Cir.2007). Here, that the affidavit was sworn to was sufficient.

2. Effect of Alleged Misrepresentations

*8 Movant argues that counsel's affidavit should be stricken because he contends it contains misrepresentations and is a "sham." Indeed, the Court may strike affidavits as "sham" testimony upon making a finding of fact that they flatly contradict earlier testimony in an attempt to create an issue of fact and avoid summary judgment. But that only applies where the affiant is proffering "an affidavit contradicting his prior deposition testimony."*Kennedy v. Allied Mut. Ins. Co.,* 952 F.2d 262, 266 (9th Cir.1991). It is a rule directed at curbing abuses of Federal Rule of Civil Procedure 30(e), which allows a deponent to submit a statement of changes upon reviewing a deposition transcript. "This sham affidavit rule prevents a party who has been examined at length on deposition from rais[ing] an issue of fact simply by submitting an affidavit contradicting his own prior testimony, which would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."*Yeager v. Bowlin,* 693 F.3d 1076, 1080 (9th Cir.2012)*cert. denied,* —— U.S. ——, 133 S.Ct. 2026, 185 L.Ed.2d 886 (2013)*reh'g denied,* —— U.S. ——, 134 S.Ct. 33, 186 L.Ed.2d 947 (2013) (internal quotations omitted).

Here, Movant does not point to prior deposition testimony by trial counsel, nor even show that he has been deposed. Rather, Movant simply argues that other evidence impeaches counsel's statements. That is not sufficient to strike an affidavit under the "sham affidavit" rule.

Moreover, the falseness of the alleged misrepresentations is not established by the record.

In his Reply, Movant points to a purported assertion in counsel's affidavit that the plea offer discussed on March 10, 2011 with the prosecution included an agreement to a minimal participant role, when no agreement to that role was reached until April 5, 2011. (Reply, Doc. 12 at 16–17.) However, counsel's affidavit does not reflect that the plea agreement stipulated to such a finding, but simply that the court could make such a finding. Counsel avows:

> 9. On March 10,2011 I met with Ernest Chrzaszcz, Mr. Larson, DEA Special Agents Mike Burke, and Cecilia Strabala at the U.S. Marshal l's Office at the Federal District COUl1 Building for an informal settlement conference. During that meeting I was present when Mr. Larson explained ... that the possible range under the plea agreement could be as low 5–6 years ***if the court***

found the defendant to be a minimal participant.

(Exhibit E, Tate Affid. at ¶ 9 (emphasis added).) Thus, counsel has not avowed that there was an agreement to minor role in that plea offer, but that it was a potential reduction in the sentence available under the plea then offered.

Next, Movant points to counsel's assertions about reviewing the evidence with Movant, and points out that at the time and thereafter counsel was asserting to the prosecutor and the court that he was still reviewing the evidence. (Reply, Doc. 12 at 19.) Movant simply misunderstands the nature of trial preparation. Counsel routinely will conduct an initial review of the prosecution's case to evaluate the likelihood of success at trial, long before completing the in-depth, line by line, word by word, review which is part of the preparation for trying a case. The undersigned does not understand counsel to be avowing that he reviewed every jot and tittle of evidence with Movant, but that he reviewed the significant evidence pointing to Movant's guilt—e.g. the circumstances of Movant's apprehension, the results of surveillance, and the phone intercepts implicating Movant. Effective counsel may spend significant amounts of time on the jots and tittles in preparation for trial in the hopes of winning small battles at trial (e.g. impeaching a witness, etc.) while at the same time knowing that the war is likely lost because of the weight or power of the evidence against his client.

*9 Next, Movant points to counsel's assertion that he had been told that Movant's brother would testify against Movant. (Reply, Doc. 12 at 18–19.) Counsel avows:

> 12. AUSA Marri Guerrero advised me that Albert Chrzaszcz, Ernest Chrzaszcz's brother, would be cooperating against Ernest and that he would testify that he knew the drugs were in the semi-truck. I later contacted Ms. Guerrero on March 10, 2011 ...
>
> * * *
>
> 14. On April 5, 2011 I received an email from USUA Brian Larson ... [with] a revised plea agreement. I explained to him the terms of the plea agreement ... and the evidence that the United States would use at trial including the fact that his brother was now cooperating.

(Exhibit E, Tate Affid.) Movant asserts that in an email dated March 31, 2011, prosecutor Guerrero reflected that Albert had not committed to testifying against Movant. AUSA Guerrero recorded in an email to AUSA Larson:

> I just spoke w/ Lloyd Tate-here is the synopsis: (1) I told him that Albert is cooperating ... Tate also said something to the effect of "well if you own brother is going to testify against you, you have problems", I told him that I wanted to clarify-Albert did not say specifically that he was going to testify against his brother, but that all options were left on the table.

(Exhibit F, Email 4/1/11 (Larson to Guerrero, included reply).) Rather than demonstrating a misrepresentation in counsel's Affidavit, the record reflects a misunderstanding between the prosecution and defense counsel in March, 2011 as to whether Movant's brother was generally cooperating and was expected to

testify against Movant, or whether he had specifically agreed to testify against Movant.

Finally, Movant points to counsel's avowal to discussing a plea offer for 36 months, when such offer was never made. However, counsel's avowal states:

> 16. I spoke with Ernest Chrzaszcz regarding the revised plea agreement on a number of occasions, including 4/11/11, 7/19/11, 8/5/11, 10/27/11. I thought it simply ridiculous for Mr. Chrzaszcz to risk being imprisoned for over 20 years when the plea offer would [have] ***allowed him to be imprisoned for less than 36 months.***

(Exhibit E, Tate Affid. (emphasis added)) The import of counsel's avowal is not that an offer was made with a stipulated sentence of 36 months, but that the offers made had the potential for such a term of imprisonment if a favorable sentence were imposed under the terms of the agreements (*e.g.* if Movant were sentenced under the guidelines pursuant to the safety valve of 18 U.S.C. § 3553(f), received a minimum or minor role, reductions for acceptance of responsibility, etc.). Moreover, the reference by counsel is not to the sentence itself, but the time Movant would be imprisoned, which would be subject to good time credits, *see e.g.*C.F.R. § 523.20 (54 days of good conduct time credits for each year served); 18 U.S.C. § 3624(b) (same), credit for time served, [1] etc. Thus, Movant fails to show any misrepresentation in this regard as well.

[1] Movant represents that he spent time in custody by state authorities following his initial arrest for the events underlying this proceeding, was again arrested in Europe on April 18, 2010, and extradited on December 3, 2010. (Declaration, Doc. 2 at 1–2.) Movant was potentially entitled to credit for time served for all such time in custody, totaling 12 months or more. *See*18 U.S.C. § 3585.

***10** Accordingly, even if this Court could strike counsel's Affidavit on the basis of mere misrepresentations, Movant has failed to show that such are contained in the affidavit.

B. REQUIREMENT FOR EVIDENTIARY HEARING

Under § 2255, "a district court must grant a hearing to determine the validity of a petition brought under that section '[u]nless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief.' " *United States v. Blaylock,* 20 F.3d 1458, 1465 (9th Cir.1994) (quoting 28 U.S.C. § 2255). The court may deny a hearing if the movant's allegations, viewed against the record, fail to state a claim for relief or "are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. Mejia–Mesa,* 153 F.3d 925, 931 (9th Cir.1998). Mere conclusory statements in a § 2255 motion are insufficient to require a hearing. *United States v. Hearst,* 638 F.2d 1190, 1194 (9th Cir.1980), *cert. denied,*451 U.S. 938, 101 S.Ct. 2018, 68 L.Ed.2d 325 (1981). "Mere conclusory allegations do not warrant an evidentiary hearing." *Shah v. U.S.,* 878 F.2d 1156, 1161 (9th Cir.1989).

The Ninth Circuit has recognized that even when credibility is at issue, no evidentiary hearing is required if it can be " 'conclusively

decided on the basis of documentary testimony and evidence in the record.' " *Shah v. U.S.*, 878 F.2d, 1156, 1159 (9th Cir.1989) (quoting *U.S. v. Espinoza*, 866 F.2d 1067, 1069 (9th Cir.1989)). In addition, judges may use discovery, documentary evidence, and their own notes and recollections of the plea hearing and sentencing process to supplement the record. *Shah*, 878 F.2d at 1159. "Judges may also use common sense." *Id.* The choice of method for handling a § 2255 motion is left to the discretion of the district court. *See id.* (citing *Watts v. United States*, 841 F.2d 275, 277 (9th Cir.1988)).

Here, as discussed hereinafter, the Movant's claims are supported only by conclusory statements, and may be conclusively decided on the basis of the record available. Accordingly, the undersigned concludes that an evidentiary hearing on Movant's claims is not required.

C. MERITS OF INEFFECTIVENESS CLAIM

1. Applicable Standard

Generally, claims of ineffective assistance of counsel are analyzed pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on such a claim, Movant must show: (1) deficient performance-counsel's representation fell below the objective standard for reasonableness; and (2) prejudice-there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687–88. Although the petitioner must prove both elements, a court may reject his claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial.*Id.* at 697.

The court hearing an ineffective assistance of counsel claim must consider the totality of the evidence with an eye toward the ultimate issue of whether counsel's conduct so undermined the functioning of the adversarial process that the proceeding lacked fundamental fairness. *Id.* at 686; *Card v. Dugger*, 911 F.2d 1494 (11th Cir.1990) (observing that counsel cannot be labeled ineffective for failing to raise issues which have no merit); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir.1985) (failing to raise meritless argument on appeal does not constitute ineffective assistance of counsel).

*11 In the unique context of a claim of ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, to establish the requisite prejudice "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel."*Missouri v. Frye*, ——U.S. ——, ——, 132 S.Ct. 1399, 1409, 182 L.Ed.2d 379 (2012)."Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law."*Id.*

Movant alleges that trial counsel performed deficiently in a laundry list of ways:

> CJA Counsel rendered deficient performance for, inter alia, failing to: (1)

> recognize trial was nearly impossible to win; (2) advise him of the true risks of going to trial; (3) provide him with a full understanding of the relevant law, application of the law to his conduct, and how the evidence would impact upon his likelihood of conviction and sentence exposure; (4) inform him of the basic structure and mechanics of the Sentencing Guidelines and true sentence exposure; (5) provide him with a full understanding of the options and benefits of pleading guilty; (6) provide his true sentence exposure versus signing plea Agreement; (7) pursue a plea agreement, and alternatively, advise him about the benfits of pleading guilty to the indictment; (8) inform him correctly of the true sentence disparity between pleading guilty versus proceeding to trial.

(Motion, Doc. 1 at 5.)

2. Prospects at Trial

Petitioner asserts three arguments concerning counsel's advice regarding his prospects at trial. He argues counsel was ineffective for failing to: "(1) recognize trial was nearly impossible to win; (2) advise him of the true risks of going to trial; (3) provide him with a full understanding of the relevant law, application of the law to his conduct, and how the evidence would impact upon his likelihood of conviction and sentence exposure."(Motion, Doc. 1 at 5.) (Those portions of these arguments related to sentencing are discussed separately hereinafter.)

Movant avows in his Declaration that:

> 3. I am not schooled in the law nor have any training, and I have a High School Diploma.
>
> * * *
>
> 16. Throughout the entire process, Tate never explained to me the low burden the Government needed to prove in order to justify a conviction for conspiracy.
>
> 17. Based on Tate's evaluation of the case, Tate felt we had a decent chance winning at trial.
>
> * * *
>
> 19. Because of the distorted view that Tate provided to me with regard to the applicable law regarding a conviction of conspiracy) we chose to proceed to trial.
>
> 20. Although I was hesitant to proceed, I relied on Tate's evaluation of the facts.
>
> 21. Throughout the process, I asked Tate several times for my discovery materials) so I could better understand the facts of my case. Counsel never provided such materials.
>
> *12 22. Tate also neglected to apprise me of other evidence (i.e.. phone calls, surveillance, etc) that the Government would be presenting in my prosecution.

* * *

25. Tate never advised me that mere testimony of a coconspirator would be enough to sustain a conviction of conspiracy.

26. I inquired to Tate as to what we could do to mitigate my sentence.

27. Tate made it clear that are [sic] chances at trial were favorable.

* * *

31. Due to Tate's interpretation of the applicable law regarding a conspiracy, I was under the impression that I did not further or advance the conspiracy.

32. Had I known what the proper applicable law concerning a conspiracy and how the Government could establish my participation, I would have pled guilty.

* * *

35. In preparation for trial, Tate did not advise me regarding the testimony of other co-conspirators and that their mere testimony would be enough to sustain a conviction of conspiracy.

36. Tate did not further advise me that although I may not exactly known what the specific contents of van, the simple act of me picking it up, would show my involvement in the conspiracy.

* * *

39. Tate did not advise me of all the witnesses that would be testifying on behalf of the Government.

40. Tate did not advise me that even though I did not know most of the others involved in the conspiracy, that their mere testimony would be found credible.

41. Tate did not advise me that their testimony was induced by the government for [leniency] in their sentence.

42. Tate gave me the impression that since the driver, Jason L. Shawd's charges had been dismissed, I to [sic] would have the same outcome.

(Declaration, Doc. 2.)

In his Reply, Movant clarifies that he is asserting counsel failed to advise Movant:

(b) circumstantial evidence alone was sufficient to sustain a conviction under 21 U.S.C. § 846;

(c) to sustain a drug conviction under 21 U.S.C. § 846, the government must prove that (1) there was an agreement to violate the drug laws, (2) the defendant had knowledge of and intent to join the conspiracy, and (3) he participated in the conspiracy;

(d) even a tactic or mutual understanding among the conspirators is sufficient to prove the first element of conspiracy;

(e) a defendant's connection to the conspiracy need only be slight, he need not be an active participant in every phase of the

conspiracy, so long as he is a party to the general conspiratorial agreement;

(f) a defendant's knowledge and or participation in the conspiracy may be inferred from his actions and reactions to the circumstances.

(Reply, Doc. 12 at 9.)

In contrast, trial counsel avows:

6. From the beginning of the case Ernest Chrzaszcz claimed his innocence based on lack of knowledge of the drugs in his semitruck and indicated that he did not want to cooperate.

* * *

8. On February 16, 2011 I received an email from Mr. Larson providing a proposed plea agreement. I advised Mr. Chrzaszcz of this plea agreement on 2/24/11. I fully explained the terms of the plea agreement, the possible range of penalties he could be facing if he would found [be] guilty at trial, and the evidence the United States would use at trial. I told Ernest Chrzaszcz the possible range of penalties he could receive if found guilty at trial was over 20 years imprisonment. I again advised him that I did not think we would prevail at trial and contrasted the prison time I estimated he would receive at trial verses the much smaller amount he would receive jf convicted. Mr. Chrzaszcz insisted that unless he was given a plea to the time he had already served he would not accept a plea agreement.

*13 * * *

9. On March 10, 2011 I met with Ernest Chrzaszcz, Mr. Larson, DEA Special Agents Mike Burke, and Cecilia Strabala at the U.S. Marshall's Office at the Federal District Court Building for an informal settlement conference. During that meeting I was present when Mr. Larson explained to the defendant the charges and evidence in the case and the plea agreement the United States was offering. Mr Larson explained the possible statutory ranges, likely range under the plea agreement and after trial....Again, I urged Mr. Chrzaszcz to accept the plea agreement however Mr. Chrzaszcz disagreed with my advice.

* * *

11. After Mr. Larson spoke with the defendant, I had Mr. Larson, Special Agent Burke, and Special Agent Strabala step out while I spoke with Ernest Chrzaszcz privately. Again, I explained to Mr. Chrzaszcz his option to accept the plea agreement or the option to take the matter to trial. Again, urging him to accept a plea agreement. Mr. Chrzaszcz became angry during our conversation again insisting he was innocent. After that discussion, Ernest Chrzaszcz rejected the plea agreement and wanted to proceed to trial.

12. AUSA Marri Guerrero advised me that Albert Chrzaszcz, Ernest Chrzaszcz's brother, would be cooperating against Ernest and that he would testify that he knew the drugs were in the semi-truck. I later contacted Ms. Guerrero on March 10, 2011. During that conversation, I informed Ms. Guerrero that Ernest Chrzaszcz said he

would plead to only possession of Marijuana and not cocaine and heroin with a 20–30 month stipulated range of imprisonment. On April 1, 2011, Ms. Guerrero emailed me and informed me that Ernest Chrzaszcz's counteroffer of [sic] to plead to marijuana and a 20–30 month sentence was rejected.

(Exhibit E, Tate Affid.)

At sentencing, Movant continued to maintain his innocence:

A week before trial my brother was interviewed by Mr. Larson and he stated that he has never—he has never told me or Jayson about the drugs, but when he testified in trial he said that I knew. It just clearly shows that he lied.

Me and Jayson Shawd were both used and lied to for their dirty work because we didn't know anything about their business and we are the victims in this case.

My brother has told me that in order for his plea agreement to be valid he had to satisfy the prosecutor and say that I was involved to save himself. When my brother and Ted talked on the phone on July 20th of 2009 that's the day after me and Jayson Shawd were arrested they clearly said that we were both not guilty, that we didn't know anything.

Why would they say that when they had no reason to? They were free and had no idea the conversation was being recorded. My brother has never told me anything, he knew better that if he did tell me that I would never agree to take those drugs, so he kept it a secret.

* * *

I feel that I was found guilty not based on facts or truth but only on assumptions and lies. I've never in my life transported drugs or belonged to any organization.

*14 I feel like I got punished for testifying and telling the truth. The only reason I didn't sign my plea agreement because I'm innocent, and also my attorney misled me by telling me that if I lode [sic] trial I would be looking at close to 10 years, if he would tell me that I'd be facing over 20 years then I would sign a plea and not take the huge risk even though I'm innocent.

(Exhibit N, R.T. 2/21/12 at 7–8.)

Deficient Performance—The undersigned finds no credibility to Movant's first and second asserted deficiencies regarding counsel's advice concerning trial, and a portion of the third. The record reflects that counsel believed and communicated to Movant that the trial was nearly impossible to win, and that the risks of going to trial were grave. Movant's assertion that "Tate felt we had a decent chance winning at trial" (Declaration, Doc. 2 at ¶ 16) sounds familiar from instances where an attorney is attempting to provide a fair evaluation of the evidence and defenses without destroying his client's trust, and the client hearing only what he wanted to hear.

Movant protests that counsel could not have provided such an evaluation given that he was simultaneously requesting continuances to complete his review of the evidence. However, this was not necessarily a complicated case as

much as a tediously voluminous one. At the final pretrial conference, counsel explained to the Court:

> The posture that it's taken, Judge, is that in preparing for this trial and going through the CDs it has just taken a long time to go through—there are thousands and thousands of documents that I have already gone through. I have met with the prosecutor on a couple of occasions, and putting this case together, the prosecutor, which I saw in his office, and I'll let him speak to that, that there is four or five boxes of materials. I've had to go through materials where there's an investigation in Chicago and then there's an investigation here and trying to put all of this together.

(Exhibit L, R.T. 8/24/11 at 5.) In the earlier pretrial conference, the prosecutor had summarized the struggles with the record:

> MR. LARSON: Your Honor, if I could, in addition to the documentary evidence, there was a five month wiretap investigation at times with several telephones being intercepted. So when we talk about the 45 disks, there is a disk containing the reports, there was search warrant evidence as well provided, photographs, but the lion's share of those disks are the calls, many of which occurred in Polish with a translation prepared by DEA or a summary prepared by DEA that's been provided to the defense as well.
>
> So there are some logistical issues that Mr. Tate has encountered in reviewing the evidence. I believe that comes from the nature of him having to glean through thousands—and I would say—we have the case agents here, but there's thousands and thousands of phone calls, some in Polish, some in English, some in Polish and Spanish, but we had both Spanish and Polish interpreters working during the interceptions on this case, and that was the basis for us designating this a complex case early on before Mr. Ernest Chrzaszcz was extradited from Poland, was to give defense counsel ample time to review. While the case itself was not overly complex, the evidence and the amount of evidence that we had in foreign languages was large.

*15 (Exhibit I, R.T. 4/11/11 at 7.) Defendants and counsel regularly evaluate a case for plea agreement purposes long before trial preparation is complete. It is unpersuasive that in a case such as the instant one that counsel had concluded the prospects at trial were dismal, long before he completed the arduous task of preparing for this week long, multilanguage trial.

Further, the record reflects that counsel reviewed with Movant the evidence and its impact upon the likelihood of conviction and sentence exposure. Aside from counsel's avowals, the pattern of conduct in counsel's contemporaneous correspondence with the prosecution and permitting Petitioner to participate in direct conversations with the

prosecutor and investigating agents are consistent with an attorney with a losing case, attempting to convince his client to take a highly favorable plea offer by providing him a clear picture of the evidence against him and his exposure at trial.

Accordingly, the undersigned concludes that Movant has failed to show deficient performance with respect to these assertions.

It is true that there is nothing presently in the record to indicate that counsel provided Movant "with a full understanding of the relevant law, application of the law to his conduct," rather than just counsel's opinions on the prospects of the case. (Petition, Doc. 1 at 5.) For example, there is nothing to show that counsel communicated the sufficiency of circumstantial evidence, the limited evidence necessary to establish a conspiracy, and the lack of need to actively participate in every phase of the conspiracy, etc.

Nonetheless, whatever deficiencies may or may not have existed in counsel's explanation of the calculus behind his conclusion that Movant would not succeed at trial, Movant had been given clear advice that he would likely lose and should accept the plea offer. It would defy common sense to assume that Movant was fixated upon such potential, though ineffective, legal defenses at trial. Movant admits that he had no legal training to have a basis to reject counsel's ultimate analysis based upon technical evaluations of the law and evidence. Movant makes no suggestion, for example, that counsel discussed such defenses, but provided incorrect advice, or that counsel had some reason to believe that Movant was relying upon such defenses in his decision to reject the plea offers and yet counsel failed to dissuade Movant from relying upon them.

At best, Movant asserts that his decision to reject the plea was based on "Tate's interpretation of the applicable law regarding a conspiracy."(Declaration, Doc. 2 at ¶ 30–31.) However, Movant makes no allegations beyond this conclusory statement to establish that counsel affirmatively misrepresented the law.

Any counsel evaluating a case may consider a myriad of potential legal issues, and ultimately conclude that they are not sufficiently applicable to warrant confusing an untrained client by raising them to the client and then dismissing them as untenable. For example, counsel does not avow that he explained a Fourth Amendment search and seizure defense, or an extradition defense, or a hearsay defense, only to dispose of them as untenable. Reasonable counsel does not engage in a pointless dissertation of legal theories with his client, but provides a cogent, understandable analysis based on factors relevant to his client evaluating a plea agreement. The record indicates that it was defense counsel did in this case.

***16** Accordingly, the undersigned finds no basis to conclude that counsel was deficient if he did, in fact, fail to discuss such issues with Movant. To the contrary, the circumstances suggest that Movant has, after the fact, developed potential but unsuccessful defenses solely to support a claim of ineffective assistance.

Prejudice—The record reflects that prior to trial and even at sentencing, Movant was fixated upon his assertion that he was unaware that there were drugs in the truck as the basis of his innocence, and his intent on not providing cooperation to the government. Thus, the undersigned finds no credibility to Movant's assertion that had he been provided further instruction on the technicalities of proof for the conspiracy charge, that he would have reached a different conclusion and would have accepted the plea offer. Accordingly, Movant has failed to establish prejudice from any such deficiencies in counsel's advice regarding such matters.

For the same reasons, the undersigned concludes there is no basis for finding a reasonable probability that had counsel offered additional advice regarding the likelihood of losing at trial, the risks of losing, and the evidence against Movant, Movant would have elected to accept the plea offers.

With regard to the evidence against Movant, any deficiency of counsel would have been further offset by knowledge in that regard provided by the prosecutor and investigating agents during their meeting with Movant. This would further make unlikely the possibility of a prejudicial effect from any deficiency in this regard by counsel.

3. Advice re Sentencing

Movant argues that trial counsel was deficient for failing to: "(4) inform him of the basic structure and mechanics of the Sentencing Guidelines and true sentence exposure"; "(6) provide his true sentence exposure versus signing plea Agreement"; and "(8) inform him correctly of the true sentence disparity between pleading guilty versus proceeding to trial."(Motion, Doc. 1 at 5.)

Deficient Performance—Based upon the record, the undersigned finds with regard to assertions (6) and (8) that Movant was repeatedly made aware of his sentencing exposure at trial and the advantages of sentencing under the plea offers.

Advice re Exposure at Trial–Movant declares that "Tate based my sentence exposure, if we were unsuccessful at trial at ten (10) years incarceration."(Declaration, Doc. 2 at ¶ 18.) Indeed, Movant argued at sentencing that he was told by counsel that he only faced 10 years.

> The only reason I didn't sign my plea agreement because I'm innocent, and also my attorney misled me by telling me that if I lode trial I would be looking at close to 10 years, if he would tell me that I'd be facing over 20 years then I would sign a plea and not take the huge risk even though I'm innocent.

(Exhibit N, R.T. 2/21/12 at 8.)

Counsel avows that after the February 16, 2011 plea offer: "I fully explained the terms of the plea agreement, the possible range of penalties he could be facing if he would [be] found guilty at trial, and the evidence the United States would use at trial. I told Ernest Chrzaszcz the possible range of penalties he could receive if found guilty at trial was over 20 years imprisonment."(Exhibit E, Tate Affid. at ¶ 8.)

*17 The plea agreements, which counsel avows he reviewed with Movant, reflected a minimum sentence of 10 years, and a maximum of life. (Exhibit B, Plea Agreement at 2.) (*See also* Exhibit G, Plea Agreement at 2.) Movant protests he never saw the plea agreements. (Declaration, Doc. 2 at ¶ 14.) Even if true, presentation of the plea agreement itself was not necessary for counsel to adequately advise Movant on his exposure at trial.

At his sentencing, Movant acknowledged being aware of a sentence greater than 10 years (albeit not 20 years):

> In the beginning of 2011 when I was interviewed by Mr. Larson I was threatened that it I don't give him information on Jayson Shawd, which is a very close friend of mine and been more like a brother to me for half of life and I told Mr. Larson that we didn't know anything so Mr. Larson got very aggressive and said that I will spend 15 years in prison.

(Exhibit N, R.T. 2/21/12 at 6.)

Movant argues that counsel's failure to refute the assertion at sentencing that counsel predicted 10 years establishes Movant's credibility. However, it is unsurprising that counsel would choose to not attack Movant's credibility at sentencing, even if Movant broadly misrepresented counsel's advice. The statements made by Movant, read from his letter to the Court, were not being presented by counsel. Indeed, Movant had refused to allow counsel to review his statement before delivering it. (*See* Exhibit N, R.T. 2/21/12 at 5–6.) Thus, counsel was not tasked with the ethical obligation of correcting any known factual misrepresentations, and would have been understandably reticent to torpedo his own client's attempt at explaining his insistence on refusing to take a plea offer and accept responsibility.

Movant himself objected that he was "threatened" with a 20 year term in prison. Counsel avows: "At the end of the presentation, Mr. Chrzaszcz accused Mr. Larson of threatening him with 20 years of prison to get him to plead guilty."(Exhibit E, Tate Affid. at ¶ 10.) Counsel avows that at the March 10, 2011 meeting with the prosecutor and case agents:

> "The possible range after trial was presented as more than 20 years but no less than 10 years because of the mandatory minimum. He also explained that the possible range under the plea agreement could be as low 5–6 years if the court found the defendant to be a minimal participant."

(Exhibit E, Tate Affid. at ¶ 9.)

Based upon the foregoing, the undersigned finds the record conclusive that Movant was made aware that he faced a sentencing range of 10 to 20 years in prison, and that counsel was not deficient in this regard.

Bad Prediction Not Deficient Performance–Further, even if it were assumed that counsel had predicted Movant's sentencing exposure at trial as 10 years rather than 20, such discrepancy would not amount to deficient performance. In *U.S. vs. Garcia,* 909 F.2d 1346 (9th Cir.1990) the Ninth Circuit held that an erroneous prediction of a sentence by a defense attorney did not rise to the level of constitutional deficient representation, and thus did not render a plea based upon such erroneous prediction involuntary.

***18** Cases both prior to and since *Garcia* have differentiated between simple errors in predictions and a gross mischaracterization of the likely outcome. For example, in *U.S. vs. Michlin,* 34 F.3d 896 (9th Cir.1994) the Ninth Circuit recognized that the court has "held that 'an erroneous prediction by defense attorney concerning sentencing does not entitle a defendant to challenge his guilty plea,' although an exception might be made in a case of 'gross mischaracterization of the likely outcome.'"*Michlin,* 34 F.3d at 899 (citations omitted).

In *Iaea v. Sunn,* 800 F.2d 861 (9th Cir.1986) defense counsel represented to the defendant that a guilty plea would give him a chance to receive probation. That advice was defective because of mandatory minimum sentences which resulted in his receiving life sentences. The court found that such a gross mischaracterization (*probation v. life sentences*) established defective performance by counsel and remanded the case for a determination on the prejudice component of the ineffective assistance claim. *Id.* at 865–66. *See also Doganiere v. United States,* 914 F.2d 165, 168 (9th Cir.1990), *cert. denied,*499 U.S. 940, 111 S.Ct. 1398, 113 L.Ed.2d 454 (1991) (no ineffectiveness where actual sentence was three years longer than attorney predicted).

In *Womack v. Del Papa,* 487 F.3d 998 (9th Cir.2007), counsel had predicted a sentence upon pleading guilty of 30 to 40 years, and instead the defendant received eight life terms without parole. The Ninth Circuit distinguished *Iaea (probation v. life*), and found the plea nonetheless voluntary.

Here the difference between a prediction of 10 years and an eventual sentence of 262 months is far closer to the 30 versus life in *Womack,* than the probation versus life in *Iaea.*It was the difference between a minimum sentence and the guidelines sentence ultimately imposed. Indeed, at sentencing counsel continued to ask the court to impose the minimum term of ten years. (Exhibit N, R.T. 2/21/12 at 9–10.) A variance in prediction between a minimum sentence and a guidelines sentence would not establish a gross mischaracterization of the possible outcome.

Accordingly, Movant has failed to show deficient performance with regard to any disparity in counsel's sentencing prediction and Movant's actual sentence.

Explanation of Sentencing Guidelines–With regard to the assertion that counsel failed to explain the structure and mechanics of the sentencing guidelines, Movant proffers no reason why such advice was required. Movant does not suggest, for example, that there was something peculiar about his sentencing exposure that mandated advice about the

method of calculation of the sentence, as opposed to the end results of those calculations. Trial counsel is not tasked with providing a legal education for his client, but with using his professional judgment to assist his client in making informed decisions about the representation.

Prejudice—Here, Movant was determined that he would maintain his innocence."Mr. Chrzaszcz always insisted the Government give him a plea offer to time served."(Exhibit E, Tate Affid. at ¶ 18.) "Mr. Chrzaszcz said he would plead to only ....a 20–30 month stipulated range of imprisonment."(*Id.* at ¶ 12.) Movant even declined to accept a plea offer combined with an offer to allow his father to plead to a very favorable misprision of a felony. (*Id.* at 19–21; Exhibit L, R.T. 8/24/11 at 18–19.) Movant admitted at sentencing that he was unswayed by the plea offers (of 5 to 6 years), but argued he would have been swayed if he had known he risked twenty years in prison, rather than ten. That contention is disproven by the record. Likewise, the record disposes of Movant's contention that his "mind was never closed to the idea of pleading guilty."(Declaration, Doc. 2 at ¶ 59.)

*19 Further, Movant was advised by the prosecutor about his exposure at trial. Accordingly, even assuming counsel had given Movant incorrect advice that he faced only 10 years at trial, and assuming that this was deficient performance, the undersigned finds no probability that Movant would have accepted the plea offers but for such advice.

4. Advice re Benefits of Plea

Movant argues counsel failed to "(5) provide him with a full understanding of the options and benefits of pleading guilty" and to "(7) ... advise him about the benefits of pleading guilty to the indictment."(Motion, Doc. 1 at 5.) To the extent that Movant refers to his allegations that counsel was deficient in advising him on the risks of trial, the evidence, applicable law, and his relative sentencing exposure, those claims are addressed in subsections 2 and 3 hereinabove.

To the extent that Movant intends this allegation to go beyond those allegations, Movant fails to identify the nature of the deficiency. Thus, the claim is conclusory and thus without merit. "It is well-established that mere conclusory allegations are not sufficient to warrant relief under a 2255 motion."*Stein v. U.S.*, 390 F.2d 625, 627 (9th Cir.1968).

Accordingly, this portion of the claim is without merit.

5. Pursuit of Plea Agreement

Finally, Movant argues that counsel was ineffective for failing to "(7) pursue a plea agreement." (Motion, Doc. 1 at 5.) In his Reply, Movant elaborates that counsel should have pursued a plea of *nolo contendre, or Alford* plea. (Reply, Doc. 12 at 11–12 (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

As discussed in *Missouri v. Frye*, 132 S.Ct. at 1410, "a defendant has no right to be offered a plea."Thus Movant bears the burden of establishing that such a plea would have not only been acceptable to the court, but would have been completed by the prosecution.

Id. at 1409–1410. Movant proffers nothing to suggest that such an offer would have been accepted by the prosecution. In light of the highly favorable nature of the plea already offered, the undersigned finds no reason to believe that an offer (even one on the all the other terms offered by the prosecution) subject to an *nolo contendre* plea would have been accepted by the prosecution.

Further, Movant admits that pursuing such a plea would have eliminated any of the benefit normally attendant with the acceptance of responsibility on a guilty plea. Thus, the outcome of such a plea would have been worse than what was rejected by Movant.

Finly,, Movant proffers nothing to support a contention that there was some unique value to Movant in a *nolo contendre* plea which would have increased the likelihood that such a plea would have been accepted by Movant.

Accordingly, Movant fails to establish that counsel was deficient in pursuing such a plea, or that prejudice resulted therefrom.

6. Summary

Movant fails to show that trial counsel performed deficiently, or that prejudice resulted. Accordingly, Ground One (the sole ground for relief) and the Motion to Vacate are without merit.

IV. CERTIFICATE OF APPEALABILITY

*20 ***Ruling Required***—Rule 11(a), Rules Governing Section 2255 Cases, requires that in habeas cases the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."Such certificates are required in cases concerning detention arising "out of process issued by a State court", or in a proceeding under 28 U.S.C. § 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1).

Here, the Motion to Vacate is brought pursuant to 28 U.S.C. § 2255. The recommendations if accepted will result in Movant's Motion to Vacate being resolved adversely to Movant. Accordingly, a decision on a certificate of Appealability is required.

Applicable Standards—The standard for issuing a certificate of appealability ("COA") is whether the applicant has "made a substantial showing of the denial of a constitutional right ."28 U.S.C. § 2253(c)(2)."Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court=s assessment of the constitutional claims debatable or wrong."*Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)."When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."*Id.*

Standard Not Met—Assuming the recommendations herein are followed in the district court's judgment, that decision will be on the merits. Under the reasoning set forth herein, the claims are plainly without merit and jurist of reason would not find it debatable whether the Motion states a valid claim. Accordingly, to the extent that the Court adopts this Report & Recommendation as to the Motion, a certificate of appealability should be denied.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Movant's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, filed January 13, 2014 (Doc. 1) be **DENIED.**

IT IS FURTHER RECOMMENDED that, to the extent the foregoing findings and recommendations are adopted in the District Court's order, a Certificate of Appealability be **DENIED.**

VI. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure,* should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure,* the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 10, Rules Governing Section 2255 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna–Tapia,* 328 F.3d 1114, 1121 (9 th Cir.2003) (*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey,* 481 F.3d 1143, 1146–47 (9th Cir.2007).

***21** Filed Dec. 17, 2014.

All Citations

Not Reported in F.Supp.3d, 2015 WL 2193713

End of Document